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Public Health Emergency No More: Pitfalls Employers Should Avoid While Easing Their COVID-Era Policies

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After more than three years, both the U.S. Department of Health and Human Services (HSS) and the World Health Organization (WHO) have ended their classification of COVID-19 as a public/global health emergency. In conjunction with those announcements, President Biden likewise ended the COVID vaccine mandates that had been in effect for federal workers and contractors.

With the health emergency officially over and the federal mandates lifted, private employers are following suit. But even as the restrictions are relaxed, the virus remains and continues to sicken people. Thus, while some may welcome this news, others may find it anxiety inducing. Employers who had instituted and enforced their own COVID policies should seriously consider reviewing those policies and how to proceed with any decision to lift such requirements.

Reviewing Your COVID-Era Policies

Employers wishing to change their COVID-related policies should carefully consider the impact that such a decision would have on their workforce in both the short-term and the long-term. For example, lifting a vaccination requirement may be met with resistance from high-risk employees uncomfortable

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working in person alongside unvaccinated employees.

To alleviate such concerns, employers may wish to retain certain precautionary policies, such as regularly disinfecting common spaces or holding group meetings in a well-ventilated space. Such employers might also remind employees that reasonable accommodations remain available on an case-by-case basis. Whatever the case, employees are less likely to have a negative response to policy reversals when they do not come as a surprise. For that reason, employers should clearly communicate these policy decisions, provide a rationale for why the decision was made, and offer a point of contact for employees to approach with any concerns.

Stay Compliant With State And Local Law

As the pandemic has worn on, a chief headache for employers – particularly those with locations in multiple states – has been how to keep up with ever-shifting state and local laws. As more states have lifted their COVID-era restrictions, employers seeking to lift their own restrictions must still remain compliant with any state requirements that remain in place.

For instance, employers in New York must provide up to four hours of leave for an employee to receive a COVID vaccination through the end of 2023. Similarly, Philadelphia employers with at least 25 employees must provide up to 40 hours of paid leave for COVID-related reasons through the end of this year. California likewise approved a Cal/OSHA regulation (with accompanying FAQ's) that will remain in effect through February 3, 2025.

Similarly, employers who incorporated COVID-era state and local mandates into their policies might wish to take this opportunity to confirm whether those requirements are still in effect, and if not, determine whether those policies are ripe for revision or removal.

Review Accommodations Granted To Employees On An Individualized Basis

The conclusion of the COVID public health emergency does not mean that employers are in the clear to unilaterally terminate all COVID-era accommodations provided to employees. The EEOC explicitly addressed this point in a recent guidance, noting that the "end of this Public Health Emergency declaration does not automatically provide grounds to terminate reasonable accommodations that continue to be needed to address on-going pandemic-related circumstances," such as those granted to high-risk individuals.

Nevertheless, the EEOC advised that employers may take this opportunity to review the accommodations that had been granted during the public health emergency, and in consultation with the employee, assess wither there continues to be a need for such an accommodation based on that employee's specific circumstances. Such employers may request further documentation to address why there is a need for an ongoing accommodation, and whether another accommodation might be sufficient to support those needs.

In some cases, employees who originally requested accommodations due to the health risk posed by COVID (such as the ability to work remotely) may no longer be able to substantiate their need for such leave on the same grounds. Employers should be prepared to answer why it would be an undue hardship for such employees to continue working remotely despite years of doing just that – particularly for employees who demonstrated measurable success during that time. At a minimum, such employers should engage in a good faith analysis to determine the essential functions of the employee's position, how a continued accommodation would impact the employer both financially and operationally, and how the costs to the employer would compare to the benefit that the

employee would derive from continued accommodation.

OSHA Requirements Remain

Employers opting to roll back their COVID-era policies should keep in mind their ongoing obligation under the Occupational Safety and Health Administration's (OSHA) "General Duty" clause to provide a work environment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." To assist employers in complying with this obligation, in August of 2021 OSHA issued "Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace." Among other things, the 2021 Guidance advised employers how to protect workers by facilitating vaccinations, implementing social distancing, maintaining ventilation systems, performing routine cleaning and disinfection, and instituting protections from retaliation against employees voicing concern about COVID-related hazards.

Although OSHA has not issued any new guidance since August 2021, it appears that is about to change; an update to OSHA's website indicates that a new guidance is "coming soon." While no further information has been provided about what the new update is expected to contain, employers should continue to follow a common-sense approach to keeping workers protected against obvious exposure to COVID or any other hazard.

Takeaway For Employers

Employers should not mistake the end of the formal public and global health emergency for COVID-19 as free license to return to business as usual. Instead, employers are well-advised to review each COVID-related policy and accommodation on a case-by-case basis, keep employees informed of all changes, and address employee concerns as they arise.

For guidance on the developing legal landscape for temporary workers and other workplace issues, consult your Akerman attorney.
